A **LOH CHIAK EONG & ANOR**

v.

LOK KOK BENG & ORS

B COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: P-02-2074-2011]
C 16 OCTOBER 2012

CONTRACT: *Building contract - Construction - Delay - New development project - Whether architects owe purchasers duty to obtain CFOs without undue delay*

D ***PROFESSIONS:*** *Architects - Duty of care in tort - New development project - Whether architects owe purchasers duty to obtain CFOs without undue delay - Whether duty of care to be imposed on architects*

TORT: *Duty of care - Professional negligence - Architects - New*
E *development project - Whether architects owe purchasers duty to obtain CFOs without undue delay - Whether duty of care to be imposed on architects - Whether just and reasonable to impose duty of care - Whether foreseeability of injury or damage leads to imposition of duty of care*

F ***TORT:*** *Negligence - Duty of care - Architects - New development project - Whether architects owe purchasers duty to obtain CFOs without undue delay - Whether duty of care to be imposed on architects - Whether just and reasonable to impose duty of care - Whether foreseeability of injury or damage leads to imposition of duty of care*

G ***TORT:*** *Negligence - Pure economic loss - Whether to impose liability - Whether architects in development project liable for losses caused by developer's delay in obtaining CFOs*

The appellants were partners in an architectural firm. They were
H sued by the respondents for professional negligence in the carrying out of their duties as the architects of a light industrial development project ('the project'). The project was undertaken by a company called Merger Acceptance Sdn. Bhd ('the developer'). The respondents were purchasers of industrial buildings
I constructed in the project. The original layout plan for the project

was submitted by the appellants, as the architects of the project, to the local authority, Majlis Perbandaran Seberang Perai ('MPSP'). MPSP, in granting the planning approval for the project, imposed a condition that the requirements of the Department of Environment ('DOE'), in particular, the provisions of the Environmental Quality (Industrial Effluent and Discharge) Regulations 1979 ("the Regulations") must be complied with. Clause 14.02 and the sixth schedule of the sale and purchase agreement ("SPA") between the developer and the respondents specifically contemplated compliance with the statutory requirements of the Regulations and for the construction of a Central Effluent Industrial Treatment System ('the CEITS') for the treatment of hazardous and toxic waste that would be discharged by the industries in the project. The respondents had full knowledge that the construction of the CEITS was an integral part of the project. The developer arranged for the construction of the CEITS but the CEITS that was constructed did not function according to the satisfaction of the DOE and DOE refused to issue its certification of approval. Hence, the appellants refused to apply for the CFOs. Subsequently, the appellants resigned as the architects for the project. The CFOs for the industrial buildings were issued only after a delay of some eight years. The respondents alleged that this delay in the obtaining of the CFOs had caused them financial loss as they could not move in into the industrial buildings and commence their business operations. The respondents alleged that this delay was due to the professional negligence on the part of the appellants. The learned High Court Judge found that there was a breach of duty of care on the part of the appellants, as the architects of the project and held the appellants liable in negligence. Hence this appeal by the appellants. The plaintiffs were not alleging any faulty design of the industrial buildings or negligent supervision on the part of the appellants resulting in personal injury or structural defects. The crucial issue was therefore whether a duty of care was owed by the appellants to the respondents to ensure that the CFOs were obtained without undue delay.

A B C D E F G H I

Held (allowing the appeal with costs)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) 'Foreseeability of harm or damage' is not the only test or factor in determining the existence of a duty of care. As a matter of law, foreseeability of injury or damage does not automatically lead to a duty of care. There are other considerations to be taken into account as well. (para 45)

(2) It would not be just and reasonable to impose a duty of care on the appellants to ensure that there is no undue delay on the part of the developer in obtaining the CFOs from MPSP. The respondents had entered into a contractual relationship with the developer and the latter was contractually obliged under the SPA to ensure that the CFO was obtained without undue delay. Therefore, should there be any undue delay in obtaining the CFO, due to some carelessness or blunder or omission on the part of the developer or its agents (the developer's architects are agents of the developer), the respondents' only remedy, was to sue the developer for breach of contract or for negligence, and not to sue the appellants, who had no contractual relationship with the respondents, by attempting to invoke the law of negligence. (para 60)

(3) The damage suffered by the plaintiffs was purely financial in nature. The financial loss was not linked to any personal injury or structural defects or damage to property. None of the respondents complained of any personal injury or of any structural defects or damage to his industrial building as a result of the lateness in obtaining the CFOs or as a result of the manner that the appellants dealt with the CFO issue. The weight of judicial opinion are against extending the *Donoghue v. Stevenson* principle to pure economic loss. (para 61)

(4) The appellants could not be faulted for refusing to apply for the CFOs (and for discharging themselves as the architects of the project) since the CEITS built by the developer on the advice of the specialist consultant had failed to meet the requirement of the Environmental Quality Act 1974 ('the EQA'). It would have been a futile exercise, highly improper and inconsistent with the EQA for the appellants to apply for the CFOs when they and the developer knew fully well that the DOE had not approved the CEITS built by the developer. (para 65)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu merupakan rakan kongsi dalam sebuah firma arkitek. Mereka didakwa oleh responden-responden kerana dituduh melakukan kecuaian professional semasa menjalankan tugas mereka sebagai arkitek bagi satu projek pembangunan industri ('projek'). Projek tersebut telah dilaksanakan oleh sebuah syarikat yang dipanggil Merger Acceptance Sdn. Bhd ('pemaju'). Responden-responden merupakan pembeli-pembeli kepada bangunan-bangunan industri yang didirikan di atas tapak projek. Selaku arkitek projek tersebut, perayu-perayu telah menyerahkan pelan susun atur asal projek kepada pihak berkuasa tempatan, Majlis Perbandaran Seberang Perai ('MPSP'). MPSP, semasa meluluskan pelan perancangan projek, telah mengenakan syarat-syarat yang dikenakan oleh Jabatan Alam Sekitar ('DOE'), terutama bahawa kehendak-kehendak Peraturan-Peraturan Kualiti Alam Sekeliling (Kumbahan dan Effluen-Effluen Perindustrian) 1979 ("Peraturan") mestilah dipatuhi. Fasal 14.02 dan jadual keenam Perjanjian Jual Beli ("PJB") antara pemaju dengan responden-responden secara spesifik memperuntukkan pematuhan kepada kehendak statutori Peraturan, dan pembinaan satu Sistem Rawatan Effluen Perindustrian Pusat ('CEITS') bagi merawat sisa-sisa toksik dan berbahaya yang akan dilepas keluar oleh kilang-kilang di kawasan projek. Responden-responden mempunyai pengetahuan penuh bahawa pembinaan CEITS merupakan satu bahagian penting projek. Pemaju mengambil langkah untuk membina CEITS tetapi CEITS yang dibina tidak berfungsi ke tahap yang memuaskan DOE dan DOE enggan mengeluarkan sijil kelulusannya. Akibatnya, perayu-perayu enggan memohon sijil-sijil layak duduk dan seterusnya meletak jawatan sebagai arkitek projek, mengakibatkan sijil-sijil layak duduk bagi bangunan-bangunan hanya dikeluarkan selepas lewat selama lapan tahun. Responden-responden menghujahkan bahawa kelewatan dalam mendapatkan sijil layak duduk telah mengakibatkan kerugian kewangan kepada mereka, disebabkan mereka tidak boleh menduduki bangunan-bangunan kilang bagi memulakan perniagaan mereka. Mereka juga mendakwa bahawa kelewatan berpunca daripada kecuaian profesional perayu-perayu. Yang Arif Hakim Mahkamah Tinggi mendapati bahawa terdapat pelanggaran terhadap kewajipan berhati-hati di pihak perayu-perayu sebagai arkitek kepada projek, dan memutuskan perayu-perayu bertanggungan kerana cuai. Perayu-perayu dengan itu merayu. Fakta menunjukkan bahawa responden-responden tidak

A mendakwa bahawa berlaku kecacatan rekabentuk pada bangunan kilang atau bahawa berlaku kecuaian berjaga-jaga oleh perayu-perayu yang menyebabkan kecederaan peribadi atau kecacatan struktur. Isu penting yang berbangkit adalah sama ada perayu-perayu memikul kewajipan berhati-hati terhadap responden-
B responden bagi memastikan bahawa sijil-sijil layak duduk diperoleh tanpa kelewatan yang tidak melampau.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Hishamudin Mohd Yunus HMR menyampaikan
C **penghakiman mahkamah:**

(1) 'Kebolehjangkaan bahaya atau kerugian' bukanlah satu-satunya ujian atau faktor dalam menentukan kewujudan sesuatu kewajipan berhati-hati. Sebagai suatu perkara undang-undang, kebolehjangkaan kecederaan atau kerugian tidak secara
D automatik membawa kepada kewajipan berhati-hati. Terdapat pertimbangan-pertimbangan lain yang turut perlu diambilkira.

(2) Adalah adil dan munasabah untuk mengenakan kewajipan berhati-hati ke atas perayu-perayu bagi memastikan bahawa
E tidak berlaku kelewatan melampau di pihak pemaju dalam memperolehi sijil layak duduk dari MPSP. Responden-responden telah memasuki satu hubungan kontraktual dengan pemaju dan pihak terkemudian bertanggungan secara kontraktual di bawah PJB bagi memastikan sijil layak duduk
F diperolehi tanpa kelewatan yang melampau. Oleh itu, jika terdapat apa-apa kelewatan melampau dalam mendapatkan sijil layak duduk, yang disebabkan oleh apa-apa kecuaian atau kesilapan atau peninggalan di pihak pemaju atau agennya (arkitek pemaju adalah agen pemaju), maka satu-satunya remedi
G responden-responden adalah untuk mendakwa pemaju kerana pelanggaran kontrak atau kecuaian, dan bukannya untuk mendakwa perayu-perayu, yang tidak mempunyai sebarang hubungan kontraktual dengan responden-responden, melalui cubaan untuk membangkitkan undang-undang kecuaian.

H

(3) Kerugian yang dialami oleh responden-responden adalah keseluruhannya berbentuk kewangan. Kerugian kewangan tersebut tidak berkaitan dengan mana-mana kecederaan peribadi atau kecacatan struktur atau kerosakan kepada harta.
I Tiada satu pun dari responden-responden mengadu mengenai

kecederaan peribadi atau apa-apa kecacatan struktur atau kerosakan kepada bangunan kilang disebabkan oleh isu kelewatan dalam memperolehi sijil layak duduk. Maka tekanan pandangan kehakiman adalah tidak terjurus kepada pemakaian prinsip kerugian kewangan semata-mata *Donoghue v. Stevenson*.

(4) Perayu-perayu tidak boleh dipersalahkan atas keengganan mereka memohon sijil layak duduk (atau menarik diri sebagai arkitek projek) oleh kerana CEITS yang dibina oleh pemaju atas nasihat perunding pakar gagal memenuhi kehendak-kehendak Akta Kualiti Alam Sekeliling 1974 ('AKAS'). Adalah satu amalan yang sia-sia, tidak wajar dan tidak konsisten dengan AKAS bagi perayu-perayu memohon sijil layak duduk sedangkan mereka serta pemaju mengetahui bahawa DOE tidak meluluskan CEITS yang dibina oleh pemaju.

Case(s) referred to:

Anns v. Merton London Borough Council [1978] AC 728 ***(refd)***
Barrett v. Enfield London Borough Council [2001] 2 AC 550 ***(refd)***
Bryan v. Maloney (1995) 128 ALR 163 ***(refd)***
Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***
D & F Estates Ltd v. Church Commissioners for England and Wales [1989] AC 177 ***(refd)***
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors [1999] 8 CLJ 131 HC ***(refd)***
Dutton v. Bognor Regis Urban District Council [1972] 1 QB 373 ***(refd)***
Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd [1985] AC 210 ***(refd)***
Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1964] AC 465 ***(refd)***
Invercargill City v. Hamlin [1994] 3 NZLR 513 ***(refd)***
Junior Books Ltd v. Veitchi Co Ltd [1983] 1 AC 520 ***(refd)***
Kerajaan Malaysia lwn. Cheah Foong Chiew & Lagi [1993] 3 CLJ 143 ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***
Man B & W Diesel S E Asia Pte Ltd and another v. PT Bumi International Tankers and another appeal [2004] 2 SLR 300 ***(foll)***
Murphy v. Brentwood District Council [1991] AC 398 ***(refd)***
RSP Architects Planners & Engineers v. Ocean Front Pte Ltd And Another Appeal [1995] 3 SLR (R) 653 ***(refd)***
Simaan General Contracting Co v. Pilkington Glass Ltd (No. 2) [1988] QB 758 ***(refd)***
Smith v. Eric S Bush [1990] 1 AC 831 ***(refd)***
Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors [2000] 4 CLJ 508 HC ***(dist)***

A *Sutherland Shire Council v. Heymann [1985] 60 ALR 1* ***(refd)***
Sutherland Shire Council v. Heyman [1984-1985] 157 CLR 424 ***(refd)***
Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors [1996] 2 CLJ 1105 ***(refd)***
Winnipeg Condominium Corporation No. 36 v. Bird Construction Co (1995) 121 DLR (4th) 193 ***(refd)***
B *Yuen Kun Yeu v. Attorney-General of Hong Kong [1988] AC 175 PC* ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218, 226(3)

C **Other source(s) referred to:**
Donald Keating, *Building Contracts*, 4th edn, p 200

For the appellants - Kenny Chan Kean Li (Yap Kok Kheong & Ong Bee Khoon with him); M/s Gibb & Co
For the respondents - Siau Suen Miin (Loo Yook Khin with him); M/s Siau
D *Suen Miin & Tan)*

[Appeal from High Court, Penang; Writ of Summons Nos: 22-130-2003 & 22-256-2003]

Reported by Amutha Suppayah

E

JUDGMENT

Hishamudin Mohd Yunus JCA:

F

Introduction

[1] This is an appeal against the decision of the High Court of Penang given on 27 July 2011.

G **[2]** On 5 January 2012 we, unanimously, allowed the appeal with costs.

[3] We now give the grounds of our decision.

The Facts Of The Case

H

[4] The appellants are architects by profession, and are partners in an architectural firm called 'Loh & Loh Architects'. They are sued by the respondents for professional negligence in the carrying out of their duties as the architects of a project known as 'Projek
I Skim Bangunan Industri Ringan Bersepadu Pencemaran Bebas' at Taman Perindustrian Machang Indah ('the project') – a development project undertaken by a company called Merger Acceptance Sdn Bhd ('the developer').

[5] The respondents are purchasers of industrial buildings or units constructed by the developer in the project. The respondents, as purchasers, each, individually, had entered into a sale and purchase agreement ('the SPA') with the developer.

[6] The developer, Merger Acceptance, had, by an agreement called 'Project Management Agreement', appointed the first defendant (Rakyat Corporation Sdn Bhd) to be the project manager of the project.

[7] Merger Acceptance, the developer, is not a party in the action.

[8] Rakyat Corporation Sdn Bhd, whilst a party to the action before the High Court, being cited as the first defendant, however, is not a party to this appeal.

[9] In the present case, the original layout plan for the project was submitted by the appellants, as the architects of the project, to the local authority, Majlis Perbandaran Seberang Perai ('MPSP'). It was prepared on the instruction of the developer and the project manager (the first defendant). It was subsequently submitted to MPSP on the instruction of the developer. MPSP approved the original layout plan on 20 December 1994. However, in reality, the road and drainage works were carried out not in accordance with the approved original layout plan. Instead, they were carried out in accordance with the Project Engineer's Plan (exh. D2A) prepared by the project engineer and approved by MPSP. But this was done not due to any oversight but on purpose: out of necessity, as the original layout plan was prepared and submitted on the understanding that the developer would obtain the consents of all the neighbouring landowners that there would be some degree of encroachment into their lands (in the form of some slope cutting on their lands); but it turned out that one of the owners of the neighbouring lots (lot 495) had refused to give consent. As a result of the refusal of the owner of lot 495 to give consent to the cutting of the slopes on his land, on the advice of the project engineer (the party responsible for the design of the plan and supervision of works in the project pertaining to roads, drainage and earthworks), the original layout plan had to be amended to reflect the true road and drainage works that were carried out. The amended layout plan was submitted on 7 August 1997 and approved by MPSP on 5 August 1999.

[10] Now, going back to the SPA, cl. 7.03 of the SPA provides:

> Section 7.03 Vendor to procure the issue of certificate of fitness for occupation.
>
> The Vendor shall do all acts and things necessary to obtain the Certificate of Fitness for Occupation from the Appropriate Authorities in respect of the Industrial Building and shall at its own cost and expense comply with all the requirements of the Appropriate Authorities.

[11] The local authority, MPSP, in granting the planning approval for the project, imposed a condition that the requirements of the Department of Environment ('DOE'), in particular, the provisions of the Environmental Quality (Industrial Effluent and Discharge) Regulations 1979 must be complied with.

[12] Clause 14.02 and the sixth schedule of the SPA specifically contemplate compliance with the statutory requirements of the Environmental Quality (Industrial Effluent and Discharge) Regulations 1979, and for the construction of a Central Effluent Industrial Treatment System ('the CEITS') for the treatment of hazardous and toxic waste that will be discharged by the industries in the project.

[13] Clause 14.02 of the SPA provides:

> **Section 14.02 Toxic Wastewater Treatment**
>
> (a) The vendor agrees to supply the relevant toxic wastewater treatment plant if so required by the purchaser and the vendor shall use its best endeavours to supply same which shall comply with the relevant existing requirements of the Department of Environment BUT ALWAYS SUBJECT to the preconditions that there is full disclosure of all the chemicals used or to be used by the purchaser together with all other information and details to be submitted in the format as set out in the Sixth Schedule herein.
>
> (b) The purchaser hereby agrees to be solely and wholly responsible and liable for any failure or shortcomings or problems whatsoever in the treatment of the wastewater as a result of inaccurate or insufficient information and details provided by the purchaser to the vendor. In such an event, the vendor shall not be liable to any party in any way whatsoever and the purchaser shall not make any claims or take any action against the vendor in respect of same.

(c) The purchaser further agrees and undertakes to utilize the relevant toxic wastewater treatment plant for discharge of wastewater and chemicals in the manner following all the prescribed conditions set by the vendor failing which the vendor cannot be held liable for anything whatsoever.

[14] The sixth schedule to the SPA provides:

Sixth Schedule

In order to facilitate the effective treatment of wastewater in compliance with the requirement of the Department of Environment, the purchaser shall hereby provide true and accurate information in respect of the items specified hereafter:

(a) Nature of Industry.

(b) Type of wastewater generated and the polluting agents it contained.

(c) Volume of wastewater discharged/generated from your manufacturing process per hour.

(d) Concentration of polluting agents (in detail).

(e) Wastewater sources from manufacturing process.

[15] The plaintiffs, as the purchasers, had full knowledge that the construction of the CEITS was an integral part of the project.

[16] Pursuant to an application made by the developer to the DOE, the latter, by its approval letter of 12 August 1997, made it a mandatory requirement that a CEITS:

(a) be designed by a specialist licensed by the DOE;

(b) be built according to prescribed specifications; and

(c) be functioning and operational to the satisfaction of the DOE before the application for the issuance of the Certificate of Fitness for Occupation ('CFO') for the project can be made, to ensure that hazardous effluents would not be discharged into the environment.

[17] Accordingly, the developer arranged for the CEITS of the project to be designed by a specialist licensed by the DOE; and, thereafter, the developer proceeded to construct the CEITS. However, the CEITS that was constructed by the developer did not function according to the satisfaction of the DOE, and as a consequence the DOE refused to issue its certification of approval.

[18] By reason of the absence of the certification of approval by the DOE, the appellants, as the architects of the project, refused to apply for the CFOs notwithstanding the instruction of the developer for them to do so.

[19] Subsequently, the appellants, by reason of their refusal to follow the instruction, resigned as the architects for the project on 13 June 2005. At the time of their resignation, the developer has yet to obtain the CFOs from the local authority.

[20] As a consequence, there was a delay in the application for the CFOs. The CFOs for the industrial buildings were issued only on 4 July 2005. Therefore there was a delay of some eight years before the purchasers could lawfully occupy the industrial buildings. The respondents alleged that this delay in the obtaining of the CFOs had caused them financial loss as they could not move in into the industrial buildings that they had purchased and to commence their business operations.

[21] The respondents alleged that this delay was due to the professional negligence on the part of the appellants.

[22] At the High Court the learned High Court Judge made a peculiar finding: he found the appellants liable in negligence, but, only to the extent of 50%. However, we will say more of this peculiarity later at the end of this judgment. He ordered damages to be assessed. The learned High Court Judge made a finding that there was a breach of duty of care on the part of the appellants, as the architects of the project, by reason of:

(a) being negligent in the preparation of the original layout plan such that the original layout plan had to be amended; and

(b) the refusal on the part of the appellants, as the architects of the project, to apply for the CFOs.

[23] According to the learned judge, the combined effect of facts (a) and (b) above resulted in a substantial delay in the obtaining of the CFOs for the industrial buildings purchased by the plaintiffs. A

[24] The appellants appealed to this court.

[25] At the trial of the action at the High Court of Penang, the appellants were the second and third defendants (therefore, in this judgment, the appellants will be referred to as the 'defendants'); whilst the company, Rakyat Corporation Sdn Bhd (which we have mentioned earlier) was the first defendant. B C

[26] Before the trial could commence, the first defendant (Rakyat Corporation Sdn Bhd) was wound up pursuant to s. 218 of the Companies Act 1965 by the Kuala Lumpur High Court (Commercial Division) *via* a winding-up petition presented by a company called Kumpulan GMC Enterprise Sdn Bhd. But the plaintiffs obtained leave of the Winding-Up Court on 13 April 2010 pursuant to s. 226(3) of the Companies Act to pursue the present action against the first defendant. D

[27] The first defendant and their counsel, however, were absent at the trial. They did not participate in the trial at all. E

[28] At the trial before the High Court, the respondents were the plaintiffs (therefore, in this judgment, the respondents will be referred to as the 'plaintiffs'). F

[29] At the outset it is to be observed that the plaintiffs are not alleging any faulty design of the industrial buildings (that they purchased from the developer) or negligent supervision on the part of the defendants, as the architects of the project, resulting in personal injury to the plaintiffs or structural defects or damage to the industrial buildings purchased by the plaintiffs. G

[30] The complaints of the plaintiffs are in regard to the performance of the defendants, as architects, in the carrying out of their duties as the architects for the project, resulting in a long delay in the obtaining of the CFOs; and as a consequence the plaintiffs suffered financial loss. H

I

A **The Crucial Issue: Is There A Duty Of Care Owed By The Defendants To The Plaintiffs**

[31] The essence of the plaintiffs' claim is that the defendants owe them a duty of care to ensure that the CFOs for the
B industrial units purchased are obtained without undue delay.

[32] Thus, in our view, the crucial issue is this: As a matter of law, is there a duty of care owed by the defendants, as the architects of the project, to the plaintiffs, as purchasers, to ensure that the developer obtained the CFOs as stipulated under cl. 7.03
C of the SPA without undue delay.

[33] The present case concerns an important issue pertaining to judicial policy in the context of the law of negligence. With respect, this important judicial policy issue, unfortunately, was not
D properly addressed to by the learned High Court Judge in his grounds of judgment. This is most unfortunate as the present case concerns an extremely difficult area of law.

[34] The difficulty encountered by the courts (not only in this
E country but in other common law jurisdictions as well) in making any new pronouncement when confronted with a new factual situation is well stated by Lord Roskill in *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 (at p. 628):

F
> I agree with Your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the question, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability.

G
[35] Be that as it may, it is the submission of learned counsel for the defendants that: (1) the delay in obtaining the CFOs was not due to any want of care or diligence on the part of the defendants as the architects of the project; and (2) in any event,
H the defendants as the architects of the project, owe no duty of care to the plaintiffs (as purchasers of the industrial units) in relation to the obtaining of the CFOs under the SPA. As learned counsel for the defendants puts it in his written submission before us:

I

> The appellants submit that such a claim is a responsibility that has been assumed contractually by the Developer rather than the appellants in their capacity as Architects of the Project [particularly section 7.01 of their respective SPA].
>
> The appellants therefore submit that it would NOT be fair, just and reasonable to impose on the appellants a duty of care for a responsibility which they had not assumed more so when it pertains to a remedy which is already contractually provided for.

[36] For the position that he takes, learned counsel for the defendants relies on the Singapore Court of Appeal's decision in the case of *Man B & W Diesel S E Asia Pte Ltd and Another v. PT Bumi International Tankers and another appeal* [2004] 2 SLR 300. In this case, the Court of Appeal said (at p. 318):

> By entering into main contract with MSE in the term which we have set out, Bumi committed itself to looking to MSE for redress. While Bumi was anxious that the sub-contractors, MBS or MBUK, should produce an engine in accordance with the specifications, it did not intend to seek redress from MBS or MBUK. In so far as Bumi was concerned, it had relied on MSE and MSE alone. It held MSE responsible. Even in *Junior Books*, Lord Roskill accepted (at 547) that the concept of proximity must always involve, at least in most cases, some degree of reliance. In such circumstances, we do not see how Bumi could have averred that it was relying on the promise of MBS and MBUK to deliver a satisfactory engine. It was not. To infer such a duty would run counter to the specific arrangement which Bumi had chosen to make with MSE. While MBS and MBUK certainly owed a duty of care to MSE by virtue of the sub-contract, we do not think a similar duty was owed to Bumi. There was no such assumption of duty by MBS or MBUK *vis-à-vis* Bumi. Bumi could have, by altering the contractual structure, made MBS or MBUK assume that responsibility. But it did not. Instead, Bumi elected to distance itself from all the sub-contractors, including MBS and MBUK.
>
> In this regard, we think the following passage, though obiter, of Lord Goff of Chieveley in *Henderson v. Merrett Syndicates Ltd* [1994] 3 WLR 761 at 790, is germane:
>
> > I wish however to add that I strongly suspect that the situation which arises in the present case is most unusual; and that in many cases in which a contractual chain comparable to that in the present case is constructed it may

well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties. It cannot therefore be inferred from the present case that other sub-agents will be held directly liable to the agent's principal in tort. Let me take the analogy of the common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract. I put on one side cases in which the sub-contractor causes physical damage to assumption of responsibility by the sub-contractor to the building owner; though the sub-contractor may be protected from liability by a contractual exemption clause authorized by the building owner. But if the sub-contracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the Hedley Byrne principle, claiming damages from him on the basis that he has been negligent in relation to the performance of his functions. For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility. This was the conclusion of the Court of Appeal in *Simaan General Contracting Co v. Pilkington Glass Ltd (No 2)* [1988] QB 758. As Bingham LJ put it, at p. 781:

> I do not, however, see any basis on which [the nominated suppliers] could be said to have assumed a direct responsibility for the quality of the goods to [the building owners]: such a responsibility is, I think, inconsistent with the structure of the contract the parties have chosen to make.

…

It is not for the court to help a party, after the event, to improve his commercial bargain. Bumi does not deserve any help. Bumi had made its bargain and must live with it. Taking the policy line advocated by Lord Denning MR in *Dutton*, it would not be just and reasonable in all the circumstances here to impose the duty on MBS or MBUK. There is every reason that the loss should fall on Bumi.

[37] Although the facts of our case are different from the facts of the above-quoted case, nevertheless, we find the above *dicta* to be of some guidance for the purpose of the present case.

[38] In our judgment, an important fact to note is that the present case is not a case of alleged carelessness on the part of the architects/defendants in the carrying out of their responsibilities as architects of the project resulting in personal injury to the plaintiffs or structural defects in the industrial buildings purchased by the plaintiffs or damage to the same.

[39] In the instant case, except for the High Court case of *Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors* [2000] 4 CLJ 508 (but see now the Federal Court judgment of *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1), no other judicial authority was cited by the plaintiffs for their proposition that the defendants as the architects of the project owe a duty of care to the purchasers to ensure that the CFOs of the buildings were obtained without undue delay by the developer.

[40] With respect, we observe that the plaintiffs, in relying on the judgment of James Foong J (as he then was) in *Steven Phoa*, had failed to appreciate that that case is totally irrelevant for the purpose of the present case, as the claims in that case involved faulty design and negligent supervision on the part of the architects resulting in death and injury to persons and damage to property.

[41] At the outset it must be appreciated that in the present case the defendants, as the architects of the project, are not the agents of the plaintiffs, the purchasers. They are the agents of their employer – the developer (Merger Acceptance). In *Building Contracts* by Donald Keating (4th edn.) the learned author states (at p. 200):

> The architect is engaged by the employer to act as his agent for the purpose of securing the completion of the works in an economical and efficient manner. He must perform these duties properly and if he fails to do so may be liable to the employer in damages. But in performing them he must act fairly and professionally in applying the terms of the building contract. Until recently it was thought that this gave rise to a 'dual capacity' as agent and as quasi-arbitrator. It has now been settled by the

A House of Lords that an architect acting under the ordinary building contract is the employer's agent throughout notwithstanding that in the administration of the contract he has to act in a fair and professional manner (*Sutcliffe v. Thackrah* [1974] AC 727).

B **[42]** In our judgment, in determining whether a duty of care exists, and the scope of such duty, all relevant circumstances would have to be examined. This approach was enunciated by Gibbs CJ in *Sutherland Shire Council v. Heyman* [1984-1985] 157 CLR 424 (at p. 441):

C

> In deciding whether the necessary relationship exists, and the scope of the duty which it creates, it is necessary for the court to examine closely all the circumstances that throw light on the nature of the relationship between the parties.

D **[43]** The above proposition was cited with approval by the Singapore Court of Appeal in *Man B & W Diesel* (see para. 31 of the judgment at p. 312).

The Finding Of The High Court Judge

E

[44] Now, in the present case, the learned High Court Judge, on the issue of liability in negligence, made a finding of mixed law and fact as follows:

> In my considered opinion the long delay in completing the project
F was caused or contributed by the 2nd and 3rd defendant as:
>
> (a) All the amendments (due to negligence of the defendants) took time and they affected the completion of Phase 1 of the project;
>
G (b) The completion of phase 1 of the project was delayed and the CF was only issued on 4/7/2005 because of the time taken for the approval of many amended plans and also the rectification works on works not done according to the original plans.
>
H (c) The amendments and rectification works might not affect the plaintiffs' individual units, but they affected and caused the unreasonable delay in the completion of Phase 1 of the project.
>
I (d) SD3, under cross-examination also admitted that, the Architect had to amend the plans, otherwise certificate of fitness could not be obtained.

The 2nd and 3rd defendants ought to know that when the approved plan of the authority was not complied with, amendments to this plan had to be made and that would undoubtedly delay the completion of the work in time for the CF to be issued and the delivery of vacant possession to be handed to the purchasers because approval for the amended plan would take a long time.

Had the 2nd and 3rd defendants exercised their duty of care with diligence and competence, they would have detected or avoided or stopped the non compliance of the contractors or engineers in the construction of the road and drainage that was not according to the original approved layout plan.

From the evidence in this case, I find that the delay which resulted in the late delivery of vacant possession of 8 years was attributed by the improper inspection and/or supervision or omission of the work at the site, to be a breach of the duty of care owed to the plaintiffs to have their unit of the industrial building purchased by them conveyed in time to hand over vacant possession with CF for their use.

...

Conclusion

In the upshot, I agree with learned counsel for the plaintiff that the 2nd and 3rd defendants' conducts, actions, inactions or omission clearly fell short of standard imposed by the law on a professional Architect.

With that, I allow the plaintiffs' claim. The 2nd and 3rd defendants are 50% liable for the negligence.

The Finding Of This Court

[45] With respect, we disagree with the above finding. In our judgment, while we agree that an architect may be made liable for faulty design or negligent supervision resulting in personal injury or inherent defects or damage to property, yet we know of no authority to support the contention made in the present case that the defendants, as the architects, owe the plaintiffs, as purchasers of the industrial buildings, a duty of care to ensure that the CFOs are obtained without undue delay. We are, however, prepared to accept the plaintiffs' contention that the defendants, as the architects of the project, would be able to foresee that the various

acts or omissions complained of, assuming for the moment that the allegations to some extent are true, would result in a delay in the obtaining the CFOs and consequential financial loss to the plaintiffs. But 'foreseeability of harm or damage' is not the only test or factor in determining the existence of a duty of care. In other words, as a matter of law, foreseeability of injury or damage does not automatically lead to a duty of care (see *Simaan General Contracting Co v. Pilkington Glass Ltd (No. 2)* [1988] QB 758; and *Man B&W Diesel*). As a matter of law, there are other considerations to be taken into account as well.

[46] It hardly needs stressing here that we are mindful of the fact that we have to tread carefully before extending the principle in *Donoghue v. Stevenson* [1932] AC 562 to the facts of our case. For, any extension of the principle to a new situation may have far-reaching consequences. The case law authorities of the various common law countries have shown that extending the principle in *Donoghue v. Stevenson* to any new situation is fraught with legal difficulties. The cases also show that any extension of the principle to a new scenario ultimately and inevitably involves an element of judicial policy. In *Dutton v. Bognor Regis Urban District Council* [1972] 1 QB 373 Lord Denning said (at p. 397):

> In *Rondel v. Worsley* [1969] 1 AC 191, we thought that if advocates were liable to be sued for negligence they would be hampered in carrying out their duties. In *Dorset Yacht Co Ltd v. Home Office* [1970] AC 1004, we thought that the Home Office ought to pay for damage done by escaping Borstal boys, if the staff was negligent, but we confined it to damage done in the immediate vicinity. In *SCM (United Kingdom) Ltd v. W J Whittall* [1971] 1 QB 337, some of us thought that economic loss ought not to be put on one pair of shoulders, but spread among the sufferers. In *Launchbury v. Morgans* [1971] 2 QB 245, we thought that as the owner of the family car was insured she should bear the loss. In short, we look at the relationship of the parties; and then say, as a matter of policy, on whom the loss should fall.

[47] Then we have the House of Lords case of *Anns v. Merton London Borough Council* [1978] AC 728 (HL(E)). It concerned a block of flats that had been constructed on ground that was subject to subsidence. The subsidence ultimately resulted in damage to the flats and those tenants who held long leases brought proceedings against the defendant local authority (and

others) for negligently failing to inspect the foundations of the premises before approving the building works on the basis if plans that were submitted by the builders. The crucial issue in this case was whether a duty of care was owed by the local authority to the tenants. In this case there was no accident causing damage in the form of injury to person or to other property. The tenants' loss was purely financial or monetary: the impact of the subsidence on the value of their property interest or, alternatively, the cost of repairs.

[48] In determining whether a duty of care existed, Lord Wilberforce advocated a two-stage test, the two components being foreseeability and policy:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

[49] The policy considerations (the second stage of the test) might include apprehension about the class of persons to whom a duty of care would be owed (as, for example, in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465 (HL(E)) where concern was expressed about the number of persons who might rely on the tortfeasor's misrepresentation); or about the nature of the loss suffered (whether purely economic or otherwise); or, about whether a private law duty of care should be recognised in a case where the parties' relationship was governed in the public sphere by statute. Lord Wilberforce and the other members of the panel of the House of Lords, ultimately, concluded that the local authority owed a duty of care to the tenants.

[50] This is, indeed, a bold attempt by Lord Wilberforce's to refine the neighbour principle to enable it to be universally applied to ever new and more far-reaching factual contexts. The two-stage test as advocated was applied by Lord Roskill subsequently in the House of Lords decision in *Junior Books Ltd v. Veitchi Co Ltd* [1983] 1 AC 520.

[51] However, in 1985 the High Court of Australia declined to apply Lord Wilberforce's two-stage test in *Sutherland Shire Council v. Heymann* [1985] 60 ALR 1, p. 43. Brennan J criticised the possibilities for a 'massive extension of a *prima facie* duty of care' which *Ann v. Merton* appeared to create. Instead, Brennan J advocated for an incrementalist approach to novel categories of negligence that were to be developed 'by analogy with established categories'. The learned judge said (at p. 44):

> I am unable to accept that approach. It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by massive extension of a *prima facie* duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'.

[52] And three years later, in *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] AC 175 (PC), the Privy Council hearing an appeal from the Hong Kong Court of Appeal ruled that the two-stage test in *Anns v. Merton* should not be regarded as in all circumstances a suitable guide in determining whether or not a duty of care was owed. In the words of the Privy Council (at p. 194):

> In view of the direction in which the law has since been developing, Their Lordships consider that for the future it should be recognised that the two-stage test in *Anns v. Merton* is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.

[53] Instead, according to the Privy Council, it was necessary to have regard to whether a close and direct relationship between the parties existed and this involved consideration of all the circumstances, including the reasonable contemplation of injury or damage being caused to the plaintiff by the defendant's failure to exercise reasonable care and any consideration of public policy that might negate the imposing of any duty of care.

[54] The above retreat from Lord Wilberforce's approach in *Anns v. Merton* culminated in *Murphy v. Brentwood District Council* [1991] AC 398 in which the House of Lords overruled *Anns v. Merton*. This case concerned a local authority's approval of the plans for the construction of a house. The local authority had relied on the

advice of a consulting engineer which had not properly taken into account miscalculations in the design of the foundations. As a result of the defective foundations there was extensive damage to the walls and pipe work of the house. The plaintiff/owner of the property did not carry out repairs, but sold the property at an undervaluation. The purchaser moved into the house and did not carry out repairs. The plaintiff's claim was for pure economic loss, the claim being the difference between the market value and the value that the house fetched when sold. The House of Lords held that *Donoghue v. Stevenson* applied to impose on the builder of a property a duty to exercise reasonable care and skill to avoid injury or damage through defects in its construction to those whom he might reasonably contemplate would be affected by his acts or omissions. However, this duty only extended to latent defects. Accordingly, where a defect was discovered before any injury to person or damage to property, other than the defective house itself, had occurred, the loss suffered by the claimant was pure economic loss and, accordingly, was irrecoverable because no duty of care was owed in respect of it. The House of Lords also held that the local authority's duties were regulated by public law duties in the form of supervising compliance with building regulations and so forth. The extension of the local authority's duties by the imposition, alongside public regulation, of a private law duty of care was contrary to public policy and should not be permitted; such extension was a matter for Parliament. Lord Mackay of Clashfern, the Lord Chancellor, said (at p. 457):

> For this House in its judicial capacity to create a large new area of responsibility on local authorities in respect of defective buildings would in my opinion not be a proper exercise of judicial power.

[55] In *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 at p. 241 Lord Keith of Kinkel expressed the judicial policy element in determining the existence of a duty of care in the following terms:

> So in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so.

[56] In the early 1990s, there were further attempts by Judges of the House of Lords to formulate a general principle by which to determine the existence of a duty of care. For instance, in *Smith v. Eric S Bush* [1990] 1 AC 831 (HL(E)) Lord Griffiths enunciated a test based on (i) foreseeability; (ii) proximity; and (iii) justice and reasonableness.

[57] In the House of Lords case of *Caparo Industries Plc v. Dickman* (a case that we have mentioned earlier) Lord Bridge of Harwich summarised the principle on duty of care as follows:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable and that the law should impose a duty of a given scope upon the one party for the benefit of the other.

[58] In the House of Lords case of *Barrett v. Enfield London Borough Council* [2001] 2 AC 550 (HL(E)) Lord Browne-Wilkinson said:

> In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered.

[59] Now, having gone through the case law, let us revert to the facts of the present case.

[60] In the present case, it is our judgment that, considering the facts of our case and the judicial authorities (none of which is on all fours with the facts of the present case), it would not be just and reasonable to impose a duty of care on the defendants/architects to ensure that there is no undue delay on the part of the developer (Merger Acceptance) in obtaining the CFOs from the local authority, MPSP. The plaintiffs, as purchasers, had entered into a contractual relationship with the developer, Merger Acceptance, and the latter is contractually obliged under cl. 7.03 of the SPA to ensure that the CFO is obtained without undue

delay. Therefore, should there be any undue delay in obtaining the CFO, due to some carelessness or blunder or omission on the part of the developer or its agents (the defendants, being the developer's architects, are the agents of the developer), the plaintiffs'/purchasers' only remedy, in our view, is to sue the developer for breach of contract or for negligence, and not to sue the defendants/architects, who have no contractual relationship with the plaintiffs/purchasers, by attempting to invoke the law of negligence. If the defendants/architects were careless or negligent in carrying out their duties resulting in a delay in the issuance of the CFO, it is to the developer that they should be answerable; and not to the plaintiffs/purchasers. The defendants/architects were not appointed by the plaintiffs/purchasers; nor were they agents of the plaintiffs/purchasers. The defendants/architects were appointed by the developer, and they were the agents of the developer. They certainly owe a duty of care to the developer, their employer, to ensure that there would be no undue delay in obtaining the CFOs. In our judgment, in the light of the contractual arrangements of the parties, it would not be fair to impose on the defendants a duty of care to the purchasers with regard to the obtaining of the CFOs. In our view, on the facts of the present case and, in particular, the contractual arrangements of the parties, it would be apt to adopt the following statement in the judgment of the Singapore Court of Appeal in *Man B & W Diesel* (at p. 321):

> It is not for the court to help a party, after the event, to improve his commercial bargain.

[61] Moreover, in the present case, there is another pertinent legal consideration: we find that the damage suffered by the plaintiffs is purely financial in nature. The financial loss is not linked to any personal injury or structural defects or damage to property. None of the plaintiffs complain of any personal injury or of any structural defects or damage to his industrial building as a result of the lateness in obtaining the CFOs or as a result of the manner that the defendants dealt with the CFO issue. We are, of course, mindful of the High Court judgment in *Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors* [1999] 8 CLJ 131; but, nonetheless, we are of the view that the weight of judicial opinion are against extending the *Donoghue v. Stevenson* principle to pure economic loss (see *D & F Estates Ltd v. Church*

A *Commissioners for England and Wales* [1989] AC 177; *Murphy v. Brentwood District Council* [1991] 1 AC 398; *Kerajaan Malaysia lwn. Cheah Foong Chiew & Lagi* [1993] 3 CLJ 143; *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors* [1996] 2 CLJ 1105). In *Murphy v. Brentwood* Lord Keith of Kinkle said (at
B p. 468):

> The right to recover for pure economic loss, not flowing from physical injury, did not then extend beyond the situation where the loss had been sustained through reliance on negligent mis-statements, as in *Hedley Byrne*.

C

[62] In this regard, we wish to associate ourselves with the observation made by the Singapore Court of Appeal in *Man B & W Diesel*, that the cases in England (for instance, *Junior Books Ltd v. Veitchi Ltd* [1983] 1 AC 520), Australia (for example,
D *Bryan v. Maloney* (1995) 128 ALR 163), New Zealand (for example, *Invercargill City v. Hamlin* [1994] 3 NZLR 513) and Canada (for example, *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co* (1995) 121 DLR (4th) 193), often quoted in support of the argument that there could be a finding of duty of
E care even in cases of supposedly 'pure' economic losses, upon a closer examination of the facts of these cases, it will be noted that in these cases the losses were in a sense not purely economic in nature; for in these cases the economic losses were suffered on account of damage to homes. Nearer to home, even in the
F Singapore landmark case of *RSP Architects Planners & Engineers v. Ocean Front Pte Ltd And Another Appeal* [1995] 3 SLR (R) 653, where the Singapore Court of Appeal had allowed a claim for 'economic loss' for the tort of negligence, there in that case it will be noted that it was not a purely economic loss as the court,
G among others, took into account the fact that the developers were negligent in their construction of the common property resulting in defects which the management corporation had to make good.

H **[63]** Our aforesaid finding that on the factual matrix of the case the defendants owe no duty of care to the plaintiffs is sufficient for us to dispose of this appeal in favour of the appellants/ defendants.

I

There Is No Breach Of Duty Of Care Anyway (Assuming There Is A Duty Of Care Owed)

[64] However, for the sake of completeness we would just like to add the following. In the instant case we find that the findings of the learned High Court Judge that the defendants were responsible for the delay in obtaining the CFOs are against the weight of the evidence. We begin with the allegation of carelessness on the part of the defendants in preparing and submitting the original layout plan to the local authority, MPSP. In this regard, we find that on the evidence the plaintiffs are making a mountain out of molehill. It is to be appreciated that even the evidence of the plaintiffs' own witness, one Mr. Ooi Yeow Khoon (PW2), the civil and structural engineer of the project, lends support to the defendants' evidence and contention that it was not the fault of the defendants that the original layout plan had to be amended. The defendants, in preparing the original layout plan, had had to rely on the expertise and inputs of the project engineer (PW2) that the layout plan necessitated encroachment into the neighbouring lands; and that PW2, in giving his inputs, in turn had relied on the assurance of the developer that they would be able to obtain the consent of all the owners of the neighbouring lots affected by the layout plan; but then, as things turned out to be, one of the owners of the neighbouring lands refused to give consent. When this particular neighbour was adamant in not giving his consent, PW2 advised the developer, the first defendant (the project manager) and the defendants (the architects) to amend the original layout plan; and the amended layout plan had to be submitted to the local authority for approval. PW2's evidence was supported by the evidence of an independent witness, one Mr. Chew Kam Soon (DW3 – a former director of the developer, besides being a qualified engineer of 29 years experience). The learned High Court Judge, in our opinion, with respect, had not given a proper evaluation of the evidence of the third defendant (architect Loh Kee Beng – DW2) as well as the evidence of PW2 and DW3 in arriving at his decision.

[65] On the evidence, the defendants also could not be faulted for refusing to apply for the CFOs (and for discharging themselves as the architects of the project) since the CEITS built by the developer on the advice of the specialist consultant had failed to

meet the requirement of the Environmental Quality Act 1974 ('the EQA'). It would have been a futile exercise, highly improper and inconsistent with the EQA for the defendants to apply for the CFOs when they and the developer knew fully well that the DOE had not approved the CEITS built by the developer. In this regard, the learned High Court Judge had failed to consider the evidence of Mr. Muniandy (DW1), the Chief Assistant Director of the Department of Environment, who testified that providing the CIETS was a mandatory requirement imposed by his department on the developer under the EQA as the purpose of the statutory law was to protect the health of the occupiers of the industrial buildings as well as the environment; and that the DOE would not support any application for CFO if this mandatory requirement was not complied with. DW1 further said in evidence that it would be an offence under the EQA for the purchasers to begin operation of their businesses on their premises (ie, the industrial buildings that they have purchased) in the absence of a CIETS approved by the DOE.

Peculiarity Of High Court's Order

[66] Finally it is disquieting for us to note from the notes of evidence, the grounds of judgment of the learned High Court Judge and the sealed order of the High Court that the learned High Court Judge only made a finding of liability on the defendants (who are the second and third defendants before the High Court). No finding of liability (or otherwise) was made against the first defendant who was absent and did not participate in the High Court proceeding. Although there is the other defendant to the action, namely, Rakyat Corporation, the first defendant, yet the notes of evidence, the grounds of judgment of the learned judge and the sealed order of the High Court appear to have just ignored the existence of this other party. The notes of evidence, the grounds of judgment and the sealed order of the High Court had merely focused on the second and third defendants.

[67] To add to this puzzle, in his notes of evidence and grounds of judgment (and confirmed by the sealed order), the learned High Court Judge, as we have pointed out earlier, found the defendants (meaning the second and third defendants) to be only '50% liable', thus implying that the second and third defendants are mere

co-tortfeasors (there is no allegation or finding of contributory negligence on the part of the plaintiffs). Yet the reason as to why the liability against the second and third defendants has to be only '50%' is, remarkably, not explained in the grounds of judgment. The reason as to why the second and third defendants are found to be mere co-tortfeasors is also, curiously, not explained in the grounds of judgment. It is also not explained in the grounds of judgment that, if the second and third defendants pare mere co-tortfeasors, then who is/are the other tortfeasor/tortfeasors who is/are also 50% liable? Is it the developer (Merger Acceptance)? Or, is it the first defendant (Rakyat Corporation)? Or, is there some other party? On this question, the notes of evidence, the grounds of judgment and the sealed order, unfortunately, appear to be silent.

[68] Appeal allowed with costs of RM50,000 for here and below.